

United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB et al.,
Plaintiffs,

v.

DALE BOSWORTH et al,
Defendants.

No. C 05-00397 CRB
Related Case No. C 05-00898 CRB
Related Case No. C 04-02588 CRB

MEMORANDUM AND ORDER

Now before the Court is a motion for preliminary injunction filed by several environmental groups asking the Court to temporarily halt the execution of a logging contract in the southern Sierra Nevada Mountains. On September 9, 2005, the Court issued a preliminary injunction temporarily stopping a different yet similar logging project because of uncertainty about its potential impact on the habitat of the Pacific fisher, a mink-like animal that may be facing extirpation in that area. See Sierra Club v. Bosworth, 2005 WL 2204986 (N.D. Cal. Sep 09, 2005) (NO. C 05-00397 CRB) (“Saddle Order”). The Court now addresses the application of the same concerns expressed in the Saddle Order to a different contract in the same region. After carefully considering the record in this matter, and with the benefit of an extended hearing which included live testimony, the Court hereby GRANTS the motion for a preliminary injunction.

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PROCEDURAL HISTORY

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2 Plaintiffs, a consortium of environmental groups, file this motion for a preliminary
3 injunction of the Ice Timber Sale (“Ice Project”) and request the Court to suspend defendant-
4 intervenor Sierra Forest Project’s logging operations related to this project until the merits of
5 the case can be decided. The Ice Project, which covers 1,160 acres within and around the
6 Giant Sequoia National Monument, includes units subject to environmental reviews in both
7 the Revised Ice Timber Sale and Fuels Reduction Project Environmental Assessment (“Ice
8 EA”) and the Revised White River Environmental Assessment (“White River EA”). The Ice
9 EA was released on September 11, 1998 and a decision notice and finding of no significant
10 impact (“Ice DN/FONSI”) was completed on December 11, 1998. Def. Opp. at 7. The
11 White River EA was published in July 1997 and was authorized by the November 14, 1997
12 decision notice and finding of no significant impact (“White River DN/FONSI”). Id. Both
13 DN/FONSIs incorporated the findings of separate Biological Evaluations (“BEs”) on
14 sensitive species in the region, including the fisher. The original EAs for all projects (Ice,
15 White River and Saddle) generally rely on the same information, most important of which is
16 the 1993 California Spotted Owl Interim Guidelines (“CASPO”), which were implemented
17 to preserve the habitat of the spotted owl and are thought to apply to the fisher, as well.
18 Among other things, the original environmental analyses concluded that the relevant logging
19 projects “may affect individual[s]” fisher, but are not likely to “result in a trend toward
20 federal listing or loss of viability” of the Pacific fisher. See Ice EA at *59. The Forest
21 Service concluded that an Environmental Impact Statement (“EIS”) was not necessary
22 because the impact of the Ice Project on “plant and animal habitat” would be “beneficial, but
23 not significant.” Def. Opp at 1.

24 On November 15, 1999, the Ice contract was awarded to intervenor. In 2001 and
25 2004, amendments to the Sierra Nevada Forest Plan (“SNFPAs”) were passed. A review of
26 the consistency of the 2001 SNFPA with the Ice Project was released on June 14, 2001 and
27 found that the CASPO Interim Guidelines were not called into question by the 2001 SNFPA.
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1 There was no review of the 2004 SNFPA until a Supplemental Information Report dated
2 August 29, 2005 (“August 29 SIR”).

3 Although the Ice Project contract was initially slated to be completed by March 31,
4 2004, its termination date was extended twice by statute because of the low price of timber
5 and then two more times for other reasons. On August 31, 2005, intervenor moved its
6 equipment from the Saddle Project to the Ice Project and commenced logging. On
7 September 9, the Court issued a preliminary injunction suspending the Saddle Fuels
8 Reduction Project (“Saddle Project”) because the United States Forest Service (“Forest
9 Service” or “Service”) had failed to conduct a ‘hard look’ at the environmental impact of a
10 project as required by the National Environmental Policy Act (“NEPA”) when significant
11 new information emerges. There, the Court determined that serious questions remained as to
12 whether the Forest Service properly performed the requisite environmental analysis of new
13 information regarding the project’s effect on the Pacific fisher, and that balancing the
14 potential for serious environmental harms with the financial harm from delay tipped in favor
15 of plaintiffs. On October 18, 2005, plaintiffs filed this motion to preliminarily enjoin the Ice
16 Project. Then, “in light of the Court’s ruling on September 9, 2005,” defendants submitted
17 more thorough SIRs dated October 26, 2005, the same day they submitted their Opposition.
18 The October SIRs purport to satisfy the Forest Service’s obligation under NEPA to conduct a
19 proper ‘hard look’ at the Ice Project’s environmental impact on the Pacific fisher. On
20 November 4, the Court heard extensive oral argument from all parties.

21 **BACKGROUND**

22 Plaintiffs contend that the new information that has emerged on the fisher since the
23 contracts were awarded in 1999 is ‘significant’ such that it triggers a requirement to conduct
24 a NEPA-authorized supplemental review. Pl. Reply at *3. Plaintiffs assert that, like the
25 Saddle Project, defendants 1) have failed to take a ‘hard look’ at new information in order to
26 reassess its previous conclusions that the Project would have “no significant impact” on the
27 fisher, and 2) have failed to assess the cumulative effects of all of the logging projects in the
28 region: the Saddle, Ice, White River and Frog projects. Pl. Mot. at *3. Moreover, plaintiffs

1 argue that the October SIRs are “facially deficient” because they are akin to litigation
2 affidavits. Pl. Reply at *3. In addition, plaintiffs contend that the SIRs are further deficient
3 because the habitat analysis conflicts with that of the original NEPA documents without
4 explanation, and the cumulative effects analysis fails to adequately explain how the impacts
5 are insignificant. Id. at *6-8. Finally, plaintiffs argue that the balance of hardships tips in
6 their favor because environmental injury cannot be repaired in the same manner that
7 economic injury can. Id. at *8-10.

8 Defendants counter that the new information is not significant and that the October
9 SIRs adequately conducted a ‘hard look.’ The SIRs conclude that, like the original FONSI,
10 additional NEPA review is not necessary because a reduction in the threat of wildfire results
11 will yield an insignificant yet beneficial impact on the fisher. Def. Opp. at *2. They also
12 argue that the importance of the project is underscored by the proximity of the logging areas
13 to residential communities and the added importance of avoiding wildfires (as distinguished
14 from the Saddle Project, which was not located as close to residential areas). Id. Finally,
15 defendants argue that the October 26 SIRs properly evaluate the cumulative effects of all the
16 logging projects on the Southern Sierra fisher sub-population and determined that the
17 analysis of the new information is consistent with the original analysis.

18 In addition, defendant-intervenor argues that the Ice Project is distinct from the Saddle
19 Project in important ways not mentioned in defendants’ brief. First, the Project has already
20 been awarded. This, in comparison to projects that have merely been proposed, prompts a
21 different, more stringent standard in evaluating whether a preliminary injunction is
22 appropriate because it alters the hardship analysis. Intv. Opp. at *6. Second, the project is an
23 integral part to a larger fuels reduction initiative in the region, which has already started. Id.
24 at *4-5. As a result, intervenor argues that it is in the public interest to reduce the threat of
25 catastrophic wildfire. Id. Third, intervenor and its employees will suffer considerable
26 financial harm if the injunction is granted. Id. at *5-6. Finally, intervenors argue that, unlike
27 the Saddle Project which had no record of the size of trees to be removed, the Ice Project
28 maintains such a record because it has already commenced. This record reveals that less than

1 1 percent of 9,000 logs are greater than 22 inches in diameter. Id. at *3. Since fishers’
 2 preferred habitat consists of larger trees, intervenor argues, the effect on the fisher will be
 3 minimal.

4 STANDARD OF REVIEW

5 I. Preliminary Injunction

6 The traditional criteria for granting preliminary relief are: 1) a likelihood of success on
 7 the merits, 2) the possibility of irreparable injury, 3) a balance of hardships favoring the
 8 plaintiff, and 4) that the preliminary relief be in the public interest. See Barahona-Gomez v.
 9 Reno, 167 F.3d 1228 (9th Cir. 1999). This test has evolved into the modern standard that the
 10 plaintiff must “demonstrate either (1) a combination of probable success on the merits and
 11 the possibility of irreparable injury if relief is not granted, or (2) the existence of serious
 12 questions going to the merits and that the balance of hardships tips sharply in its favor.” First
 13 Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1381 (9th Cir. 1987). While this test is
 14 phrased in the disjunctive, many courts view it as essentially a single test. Viewed as a single
 15 test, the greater the showing of likely success the lighter the burden in terms of the relative
 16 hardship, and vice versa. See Regents of Univ. of Calif. v. ABC, Inc., 747 F.2d 511, 515
 17 (9th Cir. 1984).

18 II. NEPA

19 The National Environmental Policy Act of 1969 (“NEPA”) is a procedural statute
 20 designed to ensure that federal agencies taking major actions affecting the quality of the
 21 human environment “will not act on incomplete information, only to regret its decision after
 22 it is too late.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). A
 23 federal agency has a continuing duty to gather and evaluate new information relevant to the
 24 environmental impact of its actions and then “make a reasoned determination whether it is of
 25 such significance as to require implementation of formal NEPA filing procedures.” Warm
 26 Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023, 1024 (9th Cir. 1980). The Ninth
 27 Circuit has held that an Environmental Impact Statement (“EIS”) “*must* be prepared if
 28 substantial questions are raised as to whether a project ... *may* cause significant degradation

1 of some environmental factor.” Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149
 2 (9th Cir. 1998) (citations omitted) (emphasis in original). Yet a plaintiff need not show that
 3 “significant effects *will in fact occur*,” rather, merely raising “substantial questions whether a
 4 project may have a significant effect is sufficient.” Id. at 1150 (emphasis added). The inquiry
 5 whether to conduct a supplemental NEPA analysis and an initial analysis is the same: “If
 6 there remains major federal action to occur, and if the new information is sufficient to show
 7 that the remaining action will ‘affect the quality of the human environment’ in a significant
 8 manner or to a significant extent not already considered, a supplemental EIS [or EA] must be
 9 prepared.” Friends of the Clearwater v. Dombeck, 222 F.3d 552, 558-558 (9th Cir. 2000)
 10 (citing Marsh, 490 U.S. at 374).¹ A proper evaluation under NEPA must also include an
 11 analysis of the cumulative effects of the individual project and others like it. See Blue
 12 Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding
 13 that a determination whether a project has a ‘significant’ impact on the environment must
 14 consider “[w]hether the action is related to other actions with individually insignificant but
 15 cumulatively significant impacts”) (quoting 40 C.F.R. § 1508.27(b)(7)).

16 The Court must determine whether the Forest Service adequately satisfied its duty
 17 under NEPA; it must not substitute its own judgment for that of the agency. See Friend of
 18 the Clearwater, 222 F.3d at 556. The Court may conclude that a proper ‘hard look’ was not
 19 conducted only if the agency’s analysis is “arbitrary and capricious or contrary to the
 20 procedures required by law.” Inland Empire Public Lands Council v. United States Forest
 21 Service, 88 F.3d 754, 763 (9th Cir. 1996). This amounts to a two-part inquiry: First, a
 22 challenge to the facial adequacy of a NEPA review requires a court to employ a ‘rule of
 23 reason’ to determine whether the review contains a “reasonably thorough discussion of the
 24 significant aspects of probable environmental consequences.” Neighbors of Cuddy Mountain
 25 v. United States Forest Service, 137 F.3d 1372, 1376 (9th Cir. 1998) (citations omitted); see

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 28 ¹There is no dispute here that the Ice Project and the similar logging projects in the region are
 “major federal actions.” Cf. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 72-73 (2004).

1 also Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir. 1988) (holding that “agency
2 action taken without observance of the procedure required by law will be set aside”).

3 Second, if the environmental review satisfies the initial facial challenge, the reviewing
4 court must determine whether the analysis therein satisfies the proper standard under NEPA.
5 The Ninth Circuit has held that analyses of primarily legal questions – such as the legal
6 meaning of ‘significance’ – are governed by a standard of ‘reasonableness.’ See Northcoast
7 Envtl. Ctr. v. Glickman, 136 F.3d 660, 667 (9th Cir. 1998) (holding that “the less deferential
8 standard of ‘reasonableness’ applies to threshold agency decisions that certain activities are
9 not subject to NEPA’s procedures”). A review of factual disputes, however, requires the
10 application of the ‘arbitrary and capricious’ standard. Id. (citing Greenpeace Action v.
11 Franklin, 14 F.3d 1324, 1331 (9th Cir. 1992). In practice, however, this distinction is
12 immaterial. See Thomas, 137 F.3d at 1149 (noting that courts have held that the arbitrary
13 and capricious and reasonableness standards under NEPA do not materially differ).

14 QUESTION PRESENTED

15 The Court is not concerned here with whether the original environmental evaluations
16 and FONSI regarding the Ice Project properly satisfied NEPA. The Court’s analysis centers
17 on whether plaintiffs have raised serious questions regarding their claim that the Service has
18 not conducted a proper ‘hard look’ at information that has been discovered or published on
19 the Pacific fisher *since* the Ice Project was approved and awarded to intervenor. In its Saddle
20 Order, the Court determined that plaintiffs had met their burden of raising serious questions
21 as to the existence of new information about the Pacific fisher that required a “hard look”
22 under NEPA. Because the same underlying claim is at issue here as in the Saddle Order --
23 that the Service did not conduct a proper NEPA analysis of new information on the viability
24 of the Pacific fisher in the Southern Sierra Nevada Mountains -- the Court hereby adopts its
25 reasoning and analysis in the Saddle Order pertaining to the existence of new information on
26 the fisher. See Saddle Order at *6-10. That finding triggers a duty under NEPA for the
27 Forest Service to conduct a ‘hard look’ at the new information to determine if it is
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1 significant, which would then require a supplemental EA or EIS. To that end, all parties
 2 agreed in open court that the narrow issue before the Court is to determine whether the two
 3 Supplemental Information Reports (“SIR”) dated October 26, 2005, satisfy the federal
 4 government’s duty under NEPA to conduct such a ‘hard look.’ In sum, the Court’s inquiry
 5 is twofold: (1) as a threshold matter, are there serious questions as to whether the October
 6 SIRs are in “observance of the procedures required by law?”; and if so, (2) should the
 7 Service’s decision not to conduct a supplemental EA or EIS be set aside as arbitrary and
 8 capricious or unreasonable?

DISCUSSION

I. Likelihood of Success on the Merits

1. Validity of October 26 SIRs

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 12 The Service argues that, upon the direction of the Court in its Saddle Order, it
 13 conducted an appropriate review of the environmental impacts of the Ice Project on the
 14 Pacific fisher and found that no significant impact exists. The October SIRs purports to
 15 analyze “information available subsequent to [the decision] to implement the [Revised Ice
 16 EA].” October Ice SIR at *1.² The evaluation determined that “because there is negligible
 17 change in analysis of effect on the fisher, no new or supplemental NEPA analysis is required
 18 and[] the original decision is affirmed.” Id.

19
 20 Plaintiffs argue that the October SIRs are essentially litigation affidavits that were
 21 prepared after logging commenced. Pl. Reply at 3 n.2. Plaintiffs contend that they “facially
 22 lack the objectivity that would warrant this Court’s deference.” Id. at 3. Further, plaintiffs
 23 argue that “no agency has prepared an in-depth, revised biological evaluation that takes a
 24 detailed look at the fisher’s current status and the ramifications of short-term habitat
 25 degradation.” Id. Plaintiffs allege that findings in the October Ice SIR, largely based on an
 26 unpublished 2001 study made for intervenor, contradict the Ice BE in a manner that the Court
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28 ²Because the two October 26 SIRs are very similar, the Court relies primarily on the Ice SIR since it is more extensive and directly related to the Ice Project.

1 deemed unsatisfactory in the Saddle Order. *Id.* at 4-5. To that end, the Ice SIR also fails to
 2 analyze the short-term effect on the fisher, relying instead on long-term rehabilitation of the
 3 area. Plaintiffs also argue that the October SIR has developed new theories for optimal fisher
 4 habitats that do not have the proper scientific underpinnings. In sum, plaintiffs contend that
 5 this latest round of SIRs do not amount to a proper ‘hard look.’

6 Three aspects of the October SIR require close scrutiny: (1) whether under these
 7 circumstances, a SIR is sufficient to satisfy NEPA; (2) that it was evidently written in six
 8 weeks in direct response to the Saddle Order as part of the Opposition to plaintiffs’ motion;
 9 and, most importantly, (3) the fact that it was prepared *after* the Ice Project had commenced.³

10 Supplemental Information Reports are the Forest Service’s formal instruments for
 11 documenting whether new information is sufficiently significant to trigger the need for a
 12 supplemental EIS (“SEIS”). *See Friends of the Clearwater*, 222 F.3d at 555 (citing Forest
 13 Service Handbook 1909.15 § 18.1). Although SIRs are not mentioned in NEPA or in the
 14 regulations implementing NEPA, “courts nonetheless have recognized a limited role within
 15 NEPA’s procedural framework for SIRs.” *Idaho Sporting Congress v. Alexander*, 222 F.3d
 16 562, 565, 566 (9th Cir. 2000). In particular, courts have condoned the use of SIRs for the
 17 specific purpose proffered here by defendants: to determine whether new information or
 18 changed circumstances require a supplemental EA or EIS. *See id.* at 566 n. 3 (noting that a
 19 SIR “is the appropriate means by which to make an initial evaluation of the significance” of
 20 new information); *see also Price Rd. Neighborhood Ass’n v. United States Dep’t of*
 21 *Transportation*, 113 F.3d 1505, 1508-09 (9th Cir. 1997) (explaining that a supplemental EA
 22 is required if the environmental impacts of changed circumstances “are significant or
 23 uncertain”). The Supreme Court has found that a SIR satisfies an agency’s NEPA
 24 obligations where the SIR demonstrates that the agency had “determined based on careful
 25 scientific analysis that the new information was of exaggerated importance,” therefore
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 28 ³It is not necessary to address plaintiffs’ arguments about the factual underpinnings of the
 October 26 SIRs since the Court is only concerned here with their facial validity.

1 indicating that the agency had “conducted a reasoned evaluation of the relevant
2 information....” Marsh, 490 U.S. at 378.

3 The Court is skeptical about the feasibility of satisfying this standard in a little more
4 than one month’s time, as the Forest Service purports to do. NEPA sets out strict criteria that
5 federal agencies must satisfy when analyzing new information to determine its significance.
6 See Thomas, 137 F.3d at 1151 (“Accurate scientific analysis, expert agency comments, and
7 *public scrutiny* are essential to implementing NEPA.”) (quoting 40 C.F.R. § 1500.1(b))
8 (emphasis in original). Although SIRs, with their more relaxed criteria, have been upheld as
9 appropriate in situations similar to this, they should not be approved where they do not
10 properly satisfy the fundamental objectives and requirements of NEPA. At the very least, a
11 careful scientific analysis would likely entail more than a cursory evaluation of a sprinkling
12 of the recent publications on topic, and would include some explanation for a conclusion that
13 directly conflicts with that of the expert federal agency in this area. See “Endangered and
14 Threatened Wildlife and Plants; 12-month Finding for a Petition to List the West Coast
15 Distinct Population Segment of the Fisher,” 69 Fed. Reg. 18770, 18790 (April 8, 2004)
16 (“FWS Finding”) (finding that the southern Sierra Pacific fisher is in danger of extirpation);
17 see also Cuddy Mountain, 137 F.3d at 1379 (noting that a NEPA review requires “some
18 quantified or detailed information”). As a result, the Court is not satisfied that the October
19 SIR amounts to a “careful scientific analysis” of the new information on the Pacific fisher.

21 Second, the Ninth Circuit has determined that an agency can rectify a violation of
22 NEPA by conducting an appropriate analysis while the case is still pending. See Friends of
23 the Clearwater, 222 F.3d at 560-561 (9th Cir. 2000) (holding that an injunction was
24 inappropriate because the Forest Service remedied their failure to satisfy NEPA). In Friends
25 of the Clearwater, however, the Forest Service prepared several documents after the
26 inception of litigation: “a new SIR, several Biological Assessments and Biological
27 Evaluations, and other documents, all of which contained additional data and analyses....” Id.
28 at 561. Furthermore, in Warm Springs, beginning one month after trial, the federal agency

1 conducted a 10-month study that was then reviewed by independent experts and the state of
2 California before determining that supplemental environmental evaluations were
3 unnecessary. See Warm Springs, 621 F.2d at 1025-1026. Here, the Court notes obvious
4 distinctions between the SIRs submitted in this case and the documents and analysis
5 conducted in Warm Springs and Friends of the Clearwater. After the Court determined in the
6 Saddle Order that the Forest Service had not conducted a proper hard look, the Service
7 submitted two very similar SIRs a mere six weeks later that appear to incorporate sections of
8 previous declarations and even portions of the original NEPA documents. The submission's
9 lack of thoroughness and reasoning does not satisfy this Circuit's precedent, as it does not
10 amount to a proper level of review that has been approved in other cases.

11 Finally, and most importantly, the SIR documents purportedly were created after the
12 Saddle Order. See October Ice SIR at *2 ("This SIR attempts to address the Court's
13 concerns in the Saddle Decision."). Yet intervenor testified in open court that logging
14 commenced on August 31, 2005. The Ninth Circuit has held that NEPA evaluations must be
15 prepared "early enough" so that they "will not be used to rationalize or justify decisions
16 already made." Save the Yaak, 840 F.2d at 718; see also Alexander, 222 F.3d at 568
17 (defining "early enough" to mean "at the earliest possible time to insure that planning and
18 decisions reflect the environmental values"). In Save the Yaak, for example, the court held
19 that the Forest Service violated NEPA's timing requirement by preparing EAs for a road
20 building project after the project had already begun. 840 F.2d at 718-719. This case falls
21 squarely under this precedent, as the October SIR was prepared after the project had begun
22 and is therefore susceptible to improper incentives to "rationalize or justify" the decision not
23 to conduct a supplemental EA or EIS. As a result, the Court finds that the Forest Service
24 violated the timing requirement of NEPA.
25

26 The Court acknowledges that the Ninth Circuit has upheld SIRs as satisfactory NEPA
27 evaluations in this context, and that proper NEPA evaluations conducted during the pendency
28 of litigation have been approved. But in the totality, where the Service rushed the creation of

1 two SIRs in order to oppose a motion for preliminary injunction while the project moves
 2 forward, plaintiffs have raised serious questions as to whether the Service has acted “contrary
 3 to the procedures required by law” and has failed to conduct a proper ‘hard look’ at the new
 4 information on the Pacific fisher.

5 **2. Analysis of the SIRs**

6 If the October SIR does satisfy NEPA’s ‘hard look’ requirement, then the Court must
 7 defer to the agency’s decision if is “fully informed and well considered.” Blue Mountains,
 8 161 F.3d at 1211.⁴ The Supreme Court has held that in this context, courts should not
 9 automatically defer to the agency without careful scrutiny to ensure “that the agency has
 10 made a reasoned decision based on its evaluation of the significance -- or lack of significance
 11 -- of the new information.” Marsh, 490 U.S. at 378. The reviewing court “must consider
 12 whether the decision was based on a consideration of the relevant factors and whether there
 13 has been a clear error of judgment.” Id. (citations omitted). Relevant factors include:

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 15 1) the environmental significance of the new information; (2) the probable
 16 accuracy of the information; (3) the degree of care with which the agency
 17 considered the information and evaluated its impact; and (4) the degree to which
 18 the agency supported its decision not to supplement with a statement of
 explanation or additional data.

19 Warm Springs, 621 F.2d at 1024. If the relevant new information raises “substantial
 20 questions whether a project may have a significant effect” on the fisher, plaintiffs have met
 21 their burden of showing that serious questions exist whether the Forest Service conducted a
 22 proper hard look. See Thomas, 137 F.3d at 1150.

23 **A. New Information**

24 In the Saddle Order, the Court determined that new information had been discovered
 25 in the six years since the Ice Project was approved. The Court noted that academic studies

26
 27 ⁴The Court refrains here from analyzing the factual disputes at issue regarding the SIRs.
 28 Although Ninth Circuit law indicates that a pure legal analysis – such as the legal meaning of
 ‘significance’ at issue here – should warrant a review under a ‘reasonableness’ standard, the Court
 nevertheless adopts the more deferential ‘arbitrary and capricious’ standard because of some confusion
 in this Circuit’s precedent. As noted above, however, the distinction is merely incidental.

1 and the thorough FWS Finding called into question some of the Forest Service’s assumptions
2 and conclusions found in the original NEPA documents. In particular, the new information
3 appeared to show that: 1) the Pacific fisher in the Southern Sierra Nevada Mountains is a
4 genetically unique species; 2) there is a real danger of its extirpation due to dwindling
5 population numbers and increased isolation such that Fish and Wildlife recommended listing
6 it as endangered but lacked the resources to do so due to other higher listing priorities; 3) the
7 effect of the Saddle Project on a few individual fishers may actually have a significant impact
8 on the viability of the species; and 4) new information indicates that the fisher’s ideal habitat
9 may be dramatically different than that identified in the BE and its incorporating documents.
10 See Saddle Order at *6-10. The October SIR attempts to evaluate this new information, and
11 the Forest Service determined that its evaluation supported the findings of the original NEPA
12 documents. As a result, the SIR concludes, “[B]ecause there is negligible change in analysis
13 of effect on the fisher, no new or supplemental NEPA analysis is required and, [sic] the
14 original decision is affirmed.” October Ice SIR at *1. Notably, however, there is no mention
15 in the SIR whether the new information is ‘significant;’ rather, the Forest Service merely
16 asserts that the “impacts on the fisher are beneficial but not significant.” Def. Opp. at *19.

18 B. Significance

19 The central concern of the Court’s analysis is not whether the new information
20 supports the Forest Service’s original conclusions, or whether the effect of the project on the
21 fisher is more likely to lead toward listing, but whether there are “*significant* new
22 circumstances or information relevant to environmental concerns and bearing on the
23 proposed action or its impacts.” Friends of the Clearwater, 222 F.3d at 557 (emphasis
24 added). If so, NEPA requires the agency to conduct a supplemental environmental analysis.
25 Id.; see also Marsh, 490 U.S. at 374. Regulations promulgated pursuant to NEPA by the
26 Council on Environmental Quality (“CEQ”) define ‘significantly’ as “requir[ing]
27 considerations of both context and intensity.” Friends of the Clearwater, 222 F.3d at 557 n.4
28 (quoting 40 C.F.R. § 1508.27). Context means that “the significance of an action must be

1 analyzed in several contexts,” including both site-specific, regional and national. Id.
 2 Intensity “refers to the severity of the impact,” and, in relevant part, the following factors
 3 should be considered:

4 (4) The degree to which the effects on the quality of the human environment are
 5 likely to be highly controversial; (5) The degree to which the possible effects on
 6 the human environment are highly uncertain or involve unique or unknown risks;
 7 and (7) whether the action is related to other actions with individually
 insignificant but cumulatively significant impacts.

8 Id.

9 **(1) Highly Controversial**

10 The Ninth Circuit has defined the term ‘controversial’ to refer “to cases where a
 11 substantial dispute exists as to the size, nature, or effect of the major Federal action rather
 12 than to the existence of opposition to a use.” Sierra Club v. United States Forest Service, 843
 13 F.3d 1190, 1193 (9th Cir. 1988). In that case, the Sierra Club introduced affidavits and
 14 testimony of experts in the field who disputed the Forest Service’s conclusion that there
 15 would be no significant effects from logging. The court then explained, “This is precisely
 16 the type of ‘controversial’ action for which an EIS must be prepared.” Id.

17 Here, plaintiffs have presented declarations, affidavits, testimony and other evidence
 18 that vigorously attacks the Forest Service’s conclusion that the Ice Project “may affect
 19 individual fisher but would not likely result in a trend toward federal listing or loss of
 20 viability of the fisher.” See October Ice SIR at *19. In particular, plaintiffs point to the FWS
 21 Finding which found that the southern Sierra Pacific fisher is genetically distinct from other
 22 fisher, and that it meets the criteria to be placed on the endangered species list but could not
 23 be listed at the time because of higher priority listings. See FWS Finding at 18777, 18791.
 24 In addition, the FWS Finding stated: “Fuels reduction treatments, including thinning and the
 25 removal of down woody debris, dense understory, snags, and low overstory tree crowns may
 26 *significantly affect fishers* in the immediate area.” FWS Finding at 18779 (emphasis added).
 27 Notably, the SIR does not address or confront these conclusions, even though the Fish and
 28

1 Wildlife Service deserves significant deference as the expert consulting federal agency for
 2 land-based species under the Endangered Species Act. See Gifford Pinchot Task Force v.
 3 United States Fish and Wildlife Serv., 378 F.3d 1059, 1063 n.1 (9th Cir. 1994). Rather, the
 4 government declared in open court that the SIR instead analyzes the academic publications
 5 underlying the Fish and Wildlife report. While the Court refrains from assessing the
 6 accuracy of the analysis in the SIR, it does observe that the 55-page FWS Finding mentions
 7 numerous academic studies published since 1999 that were not included in the SIR. In
 8 addition, plaintiffs proffered affidavits and testimony in the Saddle motion from Dr. Reginald
 9 Barrett that include several other recent studies and his own expert analysis, all of which
 10 directly contradict the SIR conclusions. See Saddle Order at *7 (noting Dr. Barrett’s
 11 testimony that the “best science” on the fisher is a 2000 report by Lamberson et al. finding
 12 that the fisher “may face imminent extinction”). The Court does not “take sides in a battle of
 13 the experts,” Native Ecosystems Council v. United States Forest Service, 2005 WL 2931893,
 14 at *9 (9th Cir. Nov. 7, 2005), but finds that plaintiffs’ well-documented and well-supported
 15 arguments against the cursory analysis and conclusory assertions of the SIR satisfies this
 16 Circuit’s ‘highly controversial’ standard under the ‘significance’ requirement. Cf. Blue
 17 Mountains, 161 F.3d at 1213 (“We do note that failure to discuss and consider [an
 18 independent] report’s recommendations lends weight to [plaintiff’s] claim that the Forest
 19 Service did not take the requisite ‘hard look’ at the environmental consequences....”).

21 (2) Highly Uncertain

22 The Ninth Circuit has determined that “[t]he purpose of an EIS is to obviate the need
 23 for speculation by insuring that available data are gathered and analyzed prior to the
 24 implementation of the proposed action.” Native Ecosystems, 2005 WL 2931893 at *5
 25 (quoting Sierra Club, 843 F.2d at 1195). Plaintiffs note that the October SIR admits that
 26 “implementation of the proposed project is not without risk” and calls for post-project
 27 monitoring. October Ice SIR at *11; see also id. at *8 (noting that “[r]esearch literature
 28

1 documenting habitat parameters associated with natal den sites has been limited”). The
2 Ninth Circuit has repeatedly “warned that general statements about ‘possible’ effects and
3 ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more
4 definitive information could not be provided.” Blue Mountains, 161 F.3d at 1213; see also
5 Cuddy Mountain, 137 F.3d at 1380. Given the abbreviated analysis on the potential effect on
6 the fisher in the October SIR, and the Service’s admissions regarding the risks of the project,
7 the Court concludes that there are serious questions concerning the degree of certainty about
8 the project’s impact on the fisher. A proper ‘hard look’ would result in greater certainty
9 about the risks involved for the fisher, particularly as they relate to the cumulative impact
10 findings below.

11 12 C. Cumulative Impacts

13 Cumulative impacts may result from “individually minor but collectively significant
14 actions taking place over a period of time.” Blue Mountains, 161 F.3d at 1214 (quoting 40
15 C.F.R. § 1508.7). Moreover, when there is the potential for cumulative harm, “an assessment
16 of connected actions is necessary *even if the impact of the proposed action is not significant.*”
17 Save the Yaak, 840 F.2d at 720 (emphasis added).

18 Here, there are at least four similar logging projects within the southern Sierra
19 Mountains that may have a cumulative effect on the fisher. The October SIR provides a one
20 paragraph summary of the cumulative impacts analysis of the original EAs, which primarily
21 asserts that if each individual project maintains an appropriate habitat quality such that the
22 fisher would not be affected, then there would be “no adverse cumulative effect that would
23 affect population viability.” October Ice SIR at *18. This is plainly contrary to this Circuit’s
24 precedent. The federal agency must conduct a hard look at all of the projects in the aggregate
25 even if the individual project does not have a significant effect.

26
27 The SIRs attempt to cure this defect by adding an analysis of the “fisher sub
28 population in the southwestern portion of the Sequoia National Forest,” where the four

1 projects are located. October Ice SIR at *18. A Forest Service analysis reveals that this area
 2 could “support up to 80 female fisher.” Id. at 19; see also FWS Finding, 69 Fed. Reg. at
 3 18790 (“Female survival has been shown to be the most important single demographic
 4 parameter determining fisher population stability.”). The SIR then states: “Based on similar
 5 analysis there could be up to 23 female fisher directly affected by all of the projects currently
 6 approved or reasonably foreseeable.”⁵ Plaintiffs have presented evidence that there may be
 7 as few as 50 female fishers remaining in the region, see Saddle Order at *7, and the
 8 government conceded at oral argument that it cannot accurately estimate how many female
 9 fishers currently exist in the southern Sierra Nevadas, but that it may be as few as 50. Even if
 10 the cumulative area encompassing the logging projects can support up to 80 female fishers,
 11 the potential to directly affect 23 appears to be quite a significant finding. At the very least,
 12 it reveals a substantial degree of uncertainty regarding the cumulative effects on the fisher of
 13 logging in this area. Moreover, the SIR does not include a reasoned or substantive analysis
 14 or explanation as to why this is not a significant finding worthy of supplemental evaluation,
 15 although they do state that anticipated impacts on individual fishers “will be documented in
 16 supplemental reviews for each individual NEPA decision.” October Ice SIR at *19. It is
 17 unclear to the Court how the Forest Service reconciles this statement with its ultimate
 18 determination that no additional environmental reviews are necessary. Nevertheless, the
 19 Court finds that there are substantial questions remaining about the cumulative effects of the
 20 logging projects on the Pacific fisher.
 21

22 The Court issues no ruling on whether the Forest Service properly evaluated the
 23 environmental significance of the new information or its probable accuracy. Rather, the
 24 Court finds that the Forest Service has failed to show the adequate degree of care in
 25

26 ⁵At oral argument, government counsel referred the Court to the author’s definition of “may
 27 affect.” See October Ice SIR at *11. There, the SIR author analogizes the application of this definition
 28 to a fisher to that of a human being stubbing her toe. Id. While the Court generally defers to the
 expertise of the federal agency on issues of environmental and biological science, it need not do so with
 regard to lay issues. It is sufficient to merely dispute the notion that a stubbed toe and a disrupted habitat
 can be properly analogized.

1 considering this information and evaluating its impact, and that the degree to which the
2 agency supported its ultimate decision not to supplement its analysis lacked the proper
3 explanation and analysis. See Warm Springs, 621 F.2d at 1024. Based on the Forest
4 Service's failure to thoroughly consider and analyze the environmental impact of the Ice
5 Project on the Pacific fisher in a timely, well-reasoned and fully-informed manner, the Court
6 finds that plaintiffs have raised serious questions about the Forest Service's decision to
7 bypass supplemental environmental reviews under NEPA.

8 **II. Balance of Hardships**

9
10 Timber cutting that has an environmental impact always has a strong potential of
11 causing irreparable harm justifying preliminary relief. See Amoco Production Co. v. Village
12 of Gambell, 480 U.S. 531, 544 (1987) (stating that, although there is no presumption of
13 irreparable harm from environmental degradation, such injuries are often not compensable by
14 money damages and can be irreparable). The Ninth Circuit has reviewed several injunction
15 motions regarding timber cutting and has often found that it fulfills the irreparable injury
16 requirement. Earth Island Institute v. United States Forest Service, 351 F.3d 1291, 1299 (9th
17 Cir. 2003). When environmental injury is "sufficiently likely, the balance of harms will
18 usually favor the issuance of an injunction to protect the environment." Alexander, 222 F.3d
19 at 569 (quoting Sierra Club, 843 F.2d at 1195).

20
21 First, defendants and intervenor argue that plaintiffs' delay in filing this motion
22 underscores the paucity of irreparable harm that would occur if an injunction is denied. They
23 point to the fact that plaintiffs have known about the Ice Project for a long time. Def. Opp. at
24 *16. Alternatively, they argue that plaintiffs waited more than a month before filing this
25 motion, well after the project commenced. Id. Yet "[c]ompliance with NEPA is a primary
26 duty of every federal agency; fulfillment of this vital responsibility should not depend on the
27 vigilance and limited resources of environmental plaintiffs." Friends of the Clearwater, 222
28 F.3d at 559 (quoting City of Davis v. Coleman, 521 F.2d 661, 667 (9th Cir. 1975)).

1 Furthermore, plaintiffs do not contend in this motion that the original NEPA documents are
2 unsatisfactory; rather, they merely contend that the Forest Service should be required to
3 conduct a more thorough supplemental review of the newly available information on the
4 fisher. A five-week delay in filing this motion is reasonable, particularly considering the six-
5 year delay that occurred before the project commenced.

6
7 Second, intervenor urges the Court to determine that the significant economic damage
8 that would be exacted by an injunction outweighs plaintiffs' claims about the dangers to the
9 fisher of the Ice Project. It is axiomatic that environmental damage cannot be undone,
10 whereas economic injury can almost always be rectified. Moreover, this is not a permanent
11 injunction. At most, intervenor would have to wait until next summer to resume its project if
12 the Court rules in its favor at a trial on the merits. In light of the fact that intervenor has
13 waited six years to execute the contract because of unfavorable timber prices, an additional
14 delay of less than one year cannot be devastating. See Saddle Order at *18. Permanent
15 damage to a sensitive species, however, may indeed be irreparable. See Alexander, 222 F.3d
16 at 569 (holding that a preliminary injunction was warranted to preserve the status quo when
17 balancing financial hardship against the sufficiently likely environmental harm from
18 logging).

19 Third, defendants argue that fuels treatment is of "highest priority" that "takes
20 precedence over other forest priorities." Def. Opp. at *8. In this respect the Ice Project
21 differs from the Saddle Project because of its proximity to residential communities and the
22 fact that much of the project exists in wild land-urban interface (WUI) where wildfires are of
23 utmost concern. The Forest Service asserts that the unique area poses "a serious threat to
24 life, property, and valuable forest resources." October Ice SIR at *6. Yet if the project was
25 urgent because of these dangers, it likely would have been regulated by 36 C.F.R. §
26 223.52(c)(1), which applies when "the Forest Service determines that the timber is in need of
27 urgent removal." Cf. Decl. of Paul S. Miller at ¶ 3 (noting that the Ice Project is authorized
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United States District Court

For the Northern District of California

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by 36 C.F.R. 223.52(c), which allowed a contract extension as a matter of right when a drastic reduction in wood prices occurs). Defendants’ argument falls hollow given the economic factors that have driven the Ice Project to date.


In sum, the Court finds that the balance of hardships tips sharply plaintiffs’ favor. Intervenor requests a bond if the Court determines to enjoin their current logging operation. But based on its testimony at oral argument, intervenor likely will be able to continue working right up until the “snow flies,” which should occur soon. In addition, intervenor can continue clean-up and removal of work already completed. Therefore, the current bond of \$5,000 is sufficient.

CONCLUSION

The Court finds that plaintiffs have raised serious questions about both the facial validity of the October SIRs and the adequacy of the Forest Service’s analysis. There remain substantial questions about the effect of the Ice Project on the Pacific fisher which require a more thorough, careful and well-reasoned analysis in order to satisfy NEPA. Because the balance of hardships plainly tip toward plaintiffs, the Court hereby GRANTS plaintiffs’ motion for a preliminary injunction. Defendants and intervenor to this action, and their contractors, are hereby enjoined from taking any further action to implement the Ice Timber Sale within the Sequoia National Forest, including permitting, commencing or continuing any timbering activities such as the cutting or logging of trees in any part of the project area. Intervenor may remove what has already been cut or logged. This injunction shall remain in effect until it is altered or discharged by a further order of this Court.

IT IS SO ORDERED.

Dated: November 14, 2005



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court

For the Northern District of California

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